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HIGH COURT OF CHHATTISGARH BILASPUR

Order reserved on 06.02.2019
Order delivered on 28.02.2019

Writ Petition (C) No. 105 OF 2019

Kansal Medical Systems Private Limited (Through Director /Authorized Representative) Flat No. 1-B, Meghna Block- D, Merlin, Jayshree Vihar, Mandi Gate, Pandri, Raipur, 492004 Chhattisgarh.

---- Petitioner

Versus

1. State Of Chhattisgarh (Through Secretary, Directorate Health Services) Mantralaya, Mahanadi Bhavan, Atal Nagar, Raipur, Chhattisgarh.

2. Chhattisgarh Medical Services Corporation Limited (Through Managing Director) 3rd Floor, Govind Sarang Vyavasayik Parisar, New Rajendra Nagar. Raipur, 492001 Chhattisgarh.

---- Respondents

For Petitioner	:	Shri Kishore Bhaduri, Advocate.
For Respondent No.1/State	:	Shri Faiz Kazi, Panel Lawyer.
For Respondent No. 2	:	Shri C. J. K. Rao, Advocate

Hon'ble Shri Ajay Kumar Tripathi, Chief Justice
Hon'ble Shri Parth Prateem Sahu, Judge

C A V ORDER

Per Parth Prateem Sahu, Judge

1. Challenge in this writ petition is to the communication dated 20.09.2018 wherein the petitioner has been shown not eligible to participate in further tender proceedings mentioning the reason therein that the average annual turnover is less than the prescribed eligibility criteria.

2. Brief facts for disposal of this writ petition, are that, respondent No.2 had issued e-tender on 20.09.2018 for the “Rate Contract and Supply of Medical Equipments for CIMS, Bilaspur”. Respondent No.2 in the said e-tender has fixed the eligibility criteria separately for manufacturers/100% subsidiaries of original manufacturer and authorized distributor. One of the eligibility criteria for manufacturers registered as 'Small Scale Industry' is the average turnover should be Rs.2 crore for last three years as mentioned in Annexure V of the tender document and for authorized dealer, average annual turnover of the bidder of Rs.3 crore or more in the three financial years, as per Annexure V of the tender document.

3. The petitioner claiming to be a Company registered under the Companies Act on 27.03.2018. The petitioner claiming himself to be Micro and Small Enterprises (hereinafter referred to as 'MSEs') had submitted the online tender for the rate contract and supply of medical equipments for CIMS, Bilaspur. Respondent No.2 found the petitioner to be ineligible for further participation in the tender process. The petitioner pleaded that he has been disqualified on a flimsy ground that the average turnover of the petitioner is less than the eligibility criteria whereas he has submitted the certificate duly issued by Chartered Accountant for financial years 2015-16, 2016-17 and

2017-18 showing that the petitioner comfortably crosses Rs.2 crore mark prescribed by respondent No.2. He further pleaded that the petitioner could have very well become eligible, if respondent No.2 had not asked for turnover of 2014-15 as the eligibility criteria for assessing the average turnover of Rs.2 crore for last three years mentioned in Annexure V.

4. Learned counsel appearing for the petitioner submitted that making one of the criteria, the average turnover for last three years including financial year 2014-15 and fixing the average annual turnover to Rs.2 crore is arbitrary and against the public policy.

5. Learned counsel appearing for respondent No.2 submitted that the petitioner after knowing well all the terms and conditions of the tender document, submitted his application and only after he was declared ineligible, he has filed this petition challenging the terms and conditions of the tender documents. He further submitted that the terms and conditions mentioned in the tender document are very specific and clear and there is no ambiguity or confusion in any of the clauses of eligibility criteria of the tender document. He further submitted that once the petitioner had participated in the tender proceedings after fully knowing what are the terms and conditions prescribed by respondent No.2 for making any of the participant eligible, then he is not permitted to challenge the terms and conditions of the said tender document after participating in the tender process.

6. Perusal of the tender document would show that the date of tender upload was 20.09.2018, last date for submission of queries and clarification was 28.09.2018 and last date for submission of tender was 06.10.2018, whereas the writ petition has been filed by the petitioner on 20.12.2018.

7. The relevant eligibility criteria as pre-fixed in the tender document so far as it relates to the manufacturers (subject matter of the petition) is reproduced herein below:-

> "<u>ELIGIBILITY CRITERIA</u>
>
> 2.1 Manufactures/ 100% Subsidiaries of original Manufacture are eligible to participate in the tender provided:
>
> i. They have valid manufacturing license for item quoted.
>
> ii. Proof of Average annual turnover of the bidder of Rs.5 crore or more in the three (3) financial years as mention in Annexure V.
>
> iii. Fully owned subsidiary company: certified by CA/CS in format annexed in Annexure-XIV.
>
> iv. The firm should not be blacklisted or debarred by any govt. organization for any reason whatsoever.
>
> v. For manufacturers registered as SSI units of Chhattisgarh, the average turnover should be Rs.2 crore for last three year as mention in Annexure V."

8. Clause 2.1 of the tender document bears that the total turnover certificate which is in format mentioning the financial years for which the average turnover is required to be calculated. Annexure V of the tender document clearly provides for turnover of the financial years 2014-15, 2015-16 and 2016-17, but the petitioner along with writ petition has filed the certificate issued by the Chartered Accountant (Annexure P/4 dated 06.06.2018) wherein the certificate has been issued for the financial years 2015-16, 2016-17 and 2017-18. The other fact which could not be lost sight is that the petitioner company was incorporated only on 27.03.2018.

9. Perusal of the terms and conditions made in tender document as well as requirements specifically provided under Annexure V have been very specifically mentioned, for which periods the turnover certificate is required. The petitioner has not chosen to challenge the terms and conditions of the tender document, but he knowing fully well, submitted his application with the turnover certificate including financial year 2017-18, which is not the requirement of the tender in question.

10. Fixing of the eligibility criteria by the Government/Corporation/Agency floating tender for contract of supply, contract for work etc. is the exclusive discretion of the said Agency looking to the nature of the work or supply to be entered into in contract.

11. The Court cannot interfere in the process of tender or on fixing the eligibility criteria by the State/Corporation/Agency and substitute his own view in the process of judicial review unless and until it is shown that the terms and conditions mentioned in the tender document is arbitrary and contrary to the public policy.

12. While imposing the terms and conditions in a tender proceedings, the State/Corporation/Agency takes care that the manufacturer as in the subject in dispute selected should be technically and financially competent to fulfill the contractual obligations. The act of the State in fixing the terms and conditions is only with a view that the Company/Agency/Firm participating in the tender proceedings should be experienced manufacturer which is the right of the Agency and the State/Corporation floating tender should get the right to select most competent person after evaluating all his business history.

13. In the case in hand, the tender which was floated by respondent No.2 is with respect to the rate contract and supply of Medical Equipment, Homeopathy and Unani Patent Drugs, which is emergent and essential requirement for the public health, therefore, looking to the concern of thousands and lakhs of people, it would be one of the most important point for consideration that the Firm/Agency selected to supply of the Medical Equipment, Homeopathy and Unani Patent Drugs should be well experienced in that field.

14. The Hon'ble Supreme Court in the matter of **Association of Registration Plates v. Union of India and others**[1] while

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1 **(2005) 1 SCC 679**

dealing with the challenge to the conditions with regard to experience in foreign countries and prescribed minimum turnover from that business held as under :-

> “35.........The State as the implementing authority has to ensure that the scheme of high security plates is effectively implemented. Keeping in view the enormous work involved in switching over to new plates within two years for existing vehicles of such large numbers in each State, resort to 'trial-and-error' method would prove hazardous. Its concern to get the right and most competent person cannot be questioned. It has to eliminate manufacturers who have developed recently just to enter into the new field. The insistence of the State to search for an experienced manufacturer with sound financial and technical capacity cannot be misunderstood. The relevant terms and conditions quoted above are so formulated to enable the State to adjudge the capability of a particular tenderer who can provide a fail-safe and sustainable delivery capacity......”

Further, in paragraph-38 held as under:-

> “38............Unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, tender conditions are unassailable.........”

Further, in paragraph-42 held as under :-

> “42...............It is easy to allege but difficult to accept that terms of the Notices Inviting Tenders which were fixed after joint deliberations between State authorities and intending tenders were so tailored as to benefit only a certain identified manufactures having foreign collaboration. Merely because a few manufacturers like the petitioners do not qualify to submit the tender, being not in a position to satisfy the terms and conditions laid down, the tender conditions cannot be held to be discriminatory.”

15. The petitioner in his pleading has neither pleaded specifically as to how the act of respondent No. 2 is arbitrary , malicious or misuse of power. He has also not raised any argument to this effect. He only argued that the eligibility criteria shows average turnover should be Rs.2 crore in three years and he fulfills the criteria on the basis of the certificate issued by the Chartered Accountant.

16. Learned counsel appearing for the petitioner submitted that as per letter dated 10.03.2016 issued by the Government of India, Ministry of Micro, Small and Medium Enterprises relaxed the condition of prior turnover and prior experience with respect to MSEs in public procurements. He also refers to the letter dated 14.10.2011 and submits that special facilities has been provided to MSEs, therefore, the condition of minimum turnover should not to be imposed for MSEs in tenders for procurement of the material.

17. We have carefully gone through the referred documents by the learned counsel for the petitioner.

18. A letter dated 10.03.2016 has been issued for all Central Ministries/Departments/Central Public Sector Undertakings only, which is evident from the letter addressed to the aforementioned departments. The other letter issued on 14.10.2011 bears the specific facilities i.e. (i) issue of tender sets free of cost; (ii) exemption from payment of Earnest Money; (iii) waiver of Security Deposit up to the Monetary Limit for which at the unit is registered; (iv) Price Preference up to 15% over the quotation of large-scale units; and (v) in addition to the above, 358 items are reserved for exclusive purchase from MSE Sector, to be provided to the MSEs and also bears that the mandatory eligibility clause of minimum turnover may not be imposed for MSEs. This letter provides for the facilities specifically, but so far as the minimum turnover part has not been made mandatory, but the word “may” has been used. The relevant portion of the letter reads as under:-

> “.........Hence, it is reiterated that the mandatory eligibility clause of minimum turnover may not be imposed for MSEs in the tenders for the procurement of the materials.”

19. The letter dated 14.10.2011 which is addressed to the Chief Secretaries of all State Governments/Union Territories only talks about the minimum turnover clause and does not talk about prior experience which can be ascertained from the turnover of any kind of their prior business activities.

20. In the case in hand, there is specific clause in eligibility criteria, in which, for an ordinary tenderer, the average annual turnover has been asked of Rs.5 crore or more and relaxation has already been granted to Small Scale Industries of Chhattisgarh and average turnover of Rs.2 crore for last three years as mentioned in Annexure V. The status of the Small Scale Industries has already been taken care of by the respondents in lowering the criteria of minimum turnover more than half and some benefit is already extended. Looking to the nature of supply contract dealing with the rate contract and supply of medical equipments, the experience clause cannot be let a go by in its entirety.

21. From reading of eligibility criteria mentioned in Clause 2.1 as well as Annexure V, it is clear that the average turnover required is for the period 2014-15, 2015-16 and 2016-17, whereas the petitioner has submitted the certificate of Chartered Accountant showing the turnover for the period 2015-16, 2016-17 and 2017-18. The petitioner has not complied with the terms and conditions and not deposited the documents as required in Annexure V, therefore, he has been declared ineligible.

22. Condition imposed for the submission of document with respect to total turnover certificate from 2014-15 for three financial years appears to be for selecting the experienced bidder/tenderer looking to the nature of the work i.e. supply of Medical Equipment, Homeopathy and Unani Patent Drugs. The Agency who had floated the tender have a right to select the experienced tenderer who can provide a fail-safe and sustainable delivery capacity.

23. The Hon'ble Supreme Court in the matter of **Global Energy Ltd. v. Adani Exports Ltd.**[2] has held that the terms of the invitation of the tender are not open to judicial scrutiny and the Courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice.

24. Further, the Supreme Court in the matter of **Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. and another**[3] held as under:-

> "12. After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made. The Court does

2 **(2005) 4 SCC 435**

3 **(2005) 6 SCC 138**

> not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. In other words, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi- administrative sphere. However, the decision must not only be tested by the application of *Wednesbury* principles of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. (See para 113 of the Report, SCC para 94)."

25. Learned counsel appearing for the petitioner lastly submitted that earlier in other tenders issued by respondent No.2, he has been found eligible, therefore, the action of respondent No.2 is arbitrary in holding the petitioner to be disqualified in the tender in question.

26. The petitioner has not filed terms and conditions of the said tender, in which, he has been shown to be eligible and even otherwise, it is the State/Corporation/Agency to fix the terms and conditions looking to the nature of the work, contract and the supply of the very tender and in the case in hand, the petitioner could not be found eligible due to non-fulfillment of the prescribed specific and unambiguous criteria of turnover.

27. In our view, the submissions made by learned counsel for the petitioner is misplaced in the very first place, because the requirement of the tender document is the average turnover for financial years 2014-15, 2015-16 and 2016-17 and from perusal of the documents annexed with the writ petition as Annexure V mentioned in tender document filed as Annexure P/4, the petitioner do not fulfill the requirements as mentioned in the eligibility criteria as he has not submitted certificate of turnover of the financial year 2014-2015. Therefore, no error has been committed by respondent No.2 in declaring the petitioner to be ineligible.

28. In conclusion of the aforementioned discussions and the law laid down by the Hon'ble Supreme Court in the aforementioned judgments, the petition being devoid of any substance, is liable to be dismissed and is hereby dismissed.

Sd/-	Sd/-
(Ajay Kumar Tripathi) **Chief Justice**	**(Parth Prateem Sahu)** **Judge**

Yogesh